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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TUDOR RANCH, INC.,

Plaintiff and Respondent,

v.

CALIFORNIA DEPARTMENT OF
PESTICIDE REGULATION,

Defendant and Appellant;

RIVERSIDE COUNTY
AGRICULTURAL COMMISSIONER,

Real Party in Interest.

E033994

(Super.Ct.No. INC 030072)

OPINION

APPEAL from the Superior Court of Riverside County. Christopher J. Sheldon,
Judge. Reversed.

Bill Lockyer, Attorney General, Mary E. Hackenbracht, Senior Assistant Attorney
General, Richard Magasin, Supervising Deputy Attorney General, and Jennifer F. Novak,
Deputy Attorney General, for Defendant and Appellant.

Swajian & Swajian, Gregory A. Swajian and Dawn M. Swajian for Plaintiff and Respondent.

Defendant and appellant Department of Pesticide Regulation of the State of California (the Department) appeals from a judgment granting a petition for writ of mandate filed by petitioner and respondent Tudor Ranch, Inc. (Tudor). The trial court ordered the Department to set aside its decision finding that Tudor applied the pesticide Dormex when there was a “reasonable possibility of damage to nontarget crops . . . or private property.” (Cal. Code of Regs. (CCR), tit. 3, § 6614, subd. (b)(2).) On appeal, the Department contends that the judgment should be vacated and that its decision should be reinstated. We agree and reverse the trial court’s grant of Tudor’s petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

Tudor is in the business of growing grapes. A vineyard owned by Tudor is located directly north of a lemon tree orchard owned by Venus Ranches (the lemon tree orchard). On December 19, 2000, Tudor applied the pesticide Dormex to its crops in the vineyard, under a restricted materials permit issued by the Riverside County Office of the Agricultural Commissioner (the Commissioner). As part of the permit, the Commissioner provided Tudor with a document entitled “Dormex Permit Conditions” (permit conditions). The subtitle of the permit conditions document was “Reason for Conditions: Lemons are Highly Susceptible to Damage from Dormex Drift.” One of the provisions in the permit conditions document stated: “Defoliation of lemon leaves resulting directly or indirectly from an application of Dormex to the permittees [*sic*] grapevines shall

constitute a violation/conflict of these permit conditions and will result in administrative/civil enforcement actions.”

On December 25, 2000, Steve Hudson, general manager of Venus Ranches, noticed “a lot of leaf drop” on some of the trees in the lemon orchard. He contacted the Commissioner to have an inspector come out to tell him what was wrong with the trees.

On December 28, 2000, Carolyn Brown and Charles Kregl, agricultural standards investigators from the Commissioner’s Office, contacted Hudson. Hudson told them that he thought the damage to the trees was caused by Dormex exposure. Brown and Kregl visited the Venus Ranches lemon tree orchard. They walked the orchard to observe any damage done to the trees. Hudson did not file a report of loss against Tudor at this time.

On January 6, 2001, Richard Bagdasarian, Inc. (Bagdasarian) applied Dormex to its grape vineyard. Bagdasarian’s vineyard is located northwest of Venus Ranches’s lemon tree orchard and directly west of Tudor’s vineyard. Hudson called the Commissioner on January 11, 2001, to report that he noticed leaf drop again. On January 12, 2001, Brown went to the lemon tree orchard and noted that there appeared to be more leaf drop. Brown noted that the trees affected this time extended further south into the orchard. She also noted that the trees in the northwest corner of the orchard appeared to have more leaf drop than the trees on the eastern edge of the orchard.

On January 16, 2001, Venus Ranches filed a report of loss against Tudor. On January 17, 2001, Venus Ranches filed a report of loss against Bagdasarian. Brown and Kregl commenced an official investigation against both Tudor and Bagdasarian. Brown and Kregl went to the lemon tree orchard to plot out the leaf drop damage on a map. They

used a scale of one to 10 to denote the level of leaf loss on each tree. A tree that had lost a significant amount of leaves would be a 10, whereas a tree that had lost over half of its leaves would be a seven. Brown and Kregl took pictures of the damaged lemon trees. Brown talked to Marion Tudor, president of Tudor Ranch; he felt that his company was not responsible for the damage done to Venus Ranches's lemon trees. Mr. Tudor stated that Hudson must not have considered the leaf drop significant after Tudor's Dormex application since Hudson did not file a report of loss until after the second incident of leaf drop occurred. Mr. Tudor felt that his company applied Dormex in a careful manner, taking due caution with the wind, applying a lower amount than allowed, and discing the field. ("Discing" is defined as driving a tractor through the vineyard "with the disc implement pulled by the tractor to turn the soil.")

Brown also interviewed Sam Blueian and Martin Caniza of Bagdasarian. Blueian supervised the spray application of Dormex on January 6, 2001. Blueian also felt that Bagdasarian applied Dormex in a careful manner. Bagdasarian used balloons to monitor the wind direction; the wind was light that day, and it was moving away from the lemon trees. Bagdasarian disced the field before and after the application of Dormex.

Brown essentially handled the investigations of the complaints against Tudor and Bagdasarian as one investigation and wrote one Pesticide Episode Investigation Report (the report) for both. In the report, Brown summarized that there were "two separate incidences that caused the leaf drop seen at Venus Ranches' lemon orchard." The first incident involved Tudor's application on December 19, 2000. This application caused leaf drop at the lemon tree orchard in the first four rows of lemon trees. Brown noted that

Tudor appeared to have made substantial efforts to apply Dormex in a careful manner. Hudson did not appear to have considered this leaf drop substantial damage.

The report stated that the second incident involved Bagdasarian's Dormex application on January 6, 2001. This application caused leaf drop "from the northwest toward the southeast throughout the orchard." Brown noted that Bagdasarian also appeared to have made an effort to apply Dormex in a careful manner. The report concluded that "[i]ndividually these incidences of drift may not have been considered to have caused substantial damage – leaf drop – to the lemon orchard. However, the accumulative [*sic*] effect of both incidences resulted in the leaf drop to the lemon orchard to be substantial. Therefore both growers will be issued a violation."

The Commissioner's Action Against Tudor

On April 30, 2001, the Commissioner issued a violation notice to Tudor. The notice alleged that Tudor failed to exercise general standards of care in order to protect property south of Tudor's vineyard from Tudor's Dormex application on December 19, 2000.

On September 12, 2001, the Commissioner issued a Notice of Proposed Action, in which the Commissioner proposed to fine Tudor \$1,000 for a serious violation of CCR, title 3, section 6614, subdivision (b)(2). (CCR, tit. 3, § 6614, subd. (b)(2) provides, in relevant part, that "no pesticide application shall be made or continued when: [¶] . . . [¶] (2) There is a reasonable possibility of damage to nontarget crops, animals, or other public or private property.") The Notice of Proposed Action stated: "Tudor Ranches failed to apply Dormex in such a manner as to prevent damage to nontarget crops in the

form of defoliation of adjacent lemon trees. Because the Dormex label states that lemons are a sensitive crop, there is a reasonable possibility that damage would occur as a result of an application conducted in the absence of adequate and significant preventative measures.” On September 27, 2001, Tudor requested an administrative hearing on the matter.

The administrative hearing was held on December 4, 2001, before William Oesterlein, Deputy Agricultural Commissioner for Riverside County (the hearing officer). At the hearing, Brown testified that the lemon tree orchard with the damaged trees was located adjacent to Tudor Ranch’s property. She testified that she contacted Tudor to verify and confirm that it had done a Dormex application on December 19, 2000.

Brown further testified that an investigation is not actually commenced until a “report of loss” is filed. Brown talked to Hudson after Tudor’s Dormex application and advised him that he had 30 days to file a report of loss against Tudor. She left the decision up to him. Hudson told her he was not sure if he was going to file a loss report. Brown testified that she later received another phone call from Hudson reporting more leaf drop at the lemon tree orchard. Brown then realized that Bagdasarian had applied Dormex to its vineyard on January 6, 2001. Brown testified that leaf loss usually occurs to a crop affected by Dormex five to seven days after a Dormex application.

When asked if she thought there was substantial damage after Tudor’s application of Dormex, Brown replied that she “always [leaves] that determination up to the grower as to whether or not he wishes to file [a report of loss].” In other words, Brown testified

that she felt that “the lemon grower needs to make the determination . . . as to what they consider to be substantial damage.” Brown testified that she would have rated the trees “about a three in the first row, and the next row after that . . . another three.” She testified that, by the fourth row, she had “to search for damage.” On cross-examination, Brown testified that the lemon trees were not in bloom and that there were no lemons on the trees, the time of the Dormex application.

When asked whether Tudor followed every precaution that it could have followed, prior to applying the Dormex, Brown replied that Tudor actually did “more than [what the Commissioner] had suggested to the industry to do.” Brown testified that Tudor disced the field before and after the application, and monitored the wind direction by using balloons. However, Brown also testified that the Dormex label suggests that a buffer zone be used to avoid Dormex drift, but no buffer zone was used.

Hudson also testified at the hearing. Hudson testified that when a lemon tree loses its leaves, the leaf loss affects the fruit. He testified that “the proof is ugly rough skin,” and that the fruit produces at the wrong time of the year. He testified that, “by the time you’re picking your crop, the fruit is no good, and it’s thrown on the ground.”

The hearing officer received documents into evidence, including Brown’s investigation report, Tudor’s Dormex permit and permit conditions, and the Dormex manufacturer’s label.

On December 19, 2001, the hearing officer, Oesterlein, issued a proposed decision. Oesterlein determined that Tudor violated CCR, title 3, section 6614, subdivision (b)(2). The evidence presented showed that Tudor applied Dormex on

December 19, 2000, to a vineyard directly north of Venus Ranches's lemon tree orchard, that Hudson noticed damage to the leaves on the lemon trees on December 25, 2000, that Brown visited the site on December 28, 2000, and noted leaf drop from the trees in the three rows closest to the Tudor vineyard, and that she testified that the damage was consistent with damage occurring as a result of exposure to Dormex. Oesterlein stated that the Dormex label cautions against potential crop loss and specifically states that "[w]hen spraying close to susceptible crops, for example, lemons, crops in bloom, sensitive foliage, etc., a buffer is suggested to be used. Extreme care must be used to avoid contact of the spray or drift with foliage, green stems, or fruit of desirable crops since severe damage and crop loss may result." Oesterlein noted that the time between the Dormex application and the leaf drop was approximately six days, which was consistent with Brown's testimony that damage from Dormex occurs within five to seven days of the application.

Oesterlein further stated that, while Tudor apparently exercised some due care, the testimonies from Brown and Hudson indicated that Tudor did not use sprinklers following the Dormex application, and Tudor did not use a buffer zone in the vineyard. Oesterlein concluded that the care taken by Tudor was evidently not sufficient because damage did occur to the leaves of Venus Ranches's lemon trees. Since Tudor had no prior violations and did take some precautions in applying Dormex, Oesterlein reduced the fine amount from the proposed amount of \$1,000 to \$401.

The Commissioner issued a Notice of Decision adopting the proposed decision, and ordered that Tudor be fined \$401.

The Commissioner's Action Against Bagdasarian

Although the record does not contain a copy of a notice of violation against Bagdasarian, the Commissioner apparently issued one. The record does contain a copy of the proposed decision, which reflects that an administrative hearing was held on December 6, 2001, regarding Bagdasarian's alleged violation of CCR, title 3, section 6614, subdivision (b)(2). The proposed decision states that the same hearing officer, Oesterlein, presided over the Bagdasarian hearing and that the same witnesses testified. However, Oesterlein found that Bagdasarian did *not* violate CCR, title 3, section 6614, subdivision (b)(2). The decision noted that the Commissioner's office handled the complaints by Venus Ranches against Tudor and Bagdasarian as one investigation. The decision stated that the Bagdasarian vineyard was treated with Dormex on January 6, 2001, and stated that the primary evidence of Dormex damage offered by the County was Hudson's personal observation on January 11, 2001. The proposed decision stated that the County failed to provide sufficient evidence as to the amount of damage resulting from each of the Dormex applications, and stated: "Since the investigation was handled as one report, and the first attempt on 1/16/01 to document the damage was after both the applications had occurred, it is not possible to establish the amount of damage, if any, that was caused by the second application . . . I believe [Bagdasarian] exercised due care to avoid damage and the County failed in its burden of proof to establish that the damaged [*sic*] observed to the lemon orchard was a direct result of the Bagdasarian Dormex application." The action against Bagdasarian was dismissed.

Tudor's Appeal to the Director of the Department of Pesticide Regulation

On January 7, 2002, Tudor appealed the Commissioner's decision and order in its case to the Director of the Department (the Director). The appeal was made on the following grounds: 1) the decision was contrary to the evidence presented by the Commissioner at the hearing; 2) there was no evidence presented by the Commissioner that Tudor's use of Dormex defoliated any lemon trees; 3) there was no evidence presented by the Commissioner of the alleged violation of Food and Agricultural Code section 12999.5(c) was "serious" (within the meaning of CCR, tit. 3, § 6130) to warrant a fine between \$401 and \$1,000 for "serious" violations; 4) there was no evidence presented by the Commissioner pursuant to CCR, title 3, section 6614, subdivision (b) that there was a reasonable possibility of contamination to non-target crops; 5) there was no evidence presented by the Commissioner pursuant to CCR, title 3, section 6130; and 6) there was no evidence presented by the Commissioner that Tudor failed to apply Dormex "in such a manner to prevent damage to non-target crops in the form of defoliation of adjacent lemon trees."

On June 12, 2002, the Director of the Department denied Tudor's request for oral argument and issued a written decision affirming the Commissioner's decision. The Director noted that Tudor did not use an untreated buffer zone between its vineyard and Venus Ranches's orchard and that there was defoliation on the trees in Venus Ranches's orchard. The Director found that Tudor did not use the extreme care required by the Dormex label to avoid contact of the Dormex spray or drift with foliage of the lemon

trees. The Director also found that Tudor's application of Dormex was made when there was a reasonable possibility of damage to nontarget crops and nontarget private property.

Tudor's Petition for Writ of Mandate

Tudor filed a petition for writ of mandate, under Code of Civil Procedure section 1094.5. Tudor petitioned the trial court to order the Director of the Department to set aside its decision dated June 12, 2002, and the Commissioner to set aside its decision dated December 19, 2001. Tudor alleged that it did not receive a fair hearing on December 4, 2001. Essentially, Tudor alleged that the hearing officer should have reached the same conclusion in Tudor's case as he did in Bagdasarian's case, which was that the County failed to provide sufficient evidence as to the amount of damage resulting from each of the Dormex applications. Thus, Tudor alleged that the count against it should have been dismissed, as was the count against Bagdasarian.

Tudor alleged that the evidence did not support the Commissioner's decision. Tudor argued that the Tudor hearing and the Bagdasarian hearing were both based on Brown's Pesticide Investigation Report, dated April 11, 2001, and the same witnesses testified at both hearings. Furthermore, the same hearing officer, Oesterlein, presided over both hearings. Tudor cited the Bagdasarian decision, in which Oesterlein stated: "It is not possible to establish the amount of damage, if any, that was caused by the second application [of Dormex]." Tudor concluded that there was no determination as to the amount of damage that was caused by its application of Dormex.

In addition, Tudor alleged that the County failed to present evidence regarding whether or not there was "substantial drift," pursuant to CCR, title 3, section 6000,

regarding defoliation or damage done to the lemon crop. Tudor argued that Venus Ranches was in the business of growing lemons, not lemon leaves. Thus, lemon leaves falling off a tree would not be considered “damage to a non-target crop.” Tudor further alleged that it exercised due care in the application of Dormex to its grapes, and that there was no scientific evidence or expert opinion at the hearing that the alleged defoliation of the lemon trees was caused by Dormex.

On April 24, 2003, the trial court heard oral argument on the petition. The trial court granted the petition and ordered the Department to set aside the decision of the Director of the Department, dated June 12, 2002. The court stated the following: “The Court finds upon review of the Administrative Records[,] specifically the Pesticide Investigation Report of Caroline [*sic*] Brown dated November 11, 2001, there is no substantial evidence to support the Director’s decision in the matter.”

The Department filed a timely notice of appeal and seeks to have the Director’s decision reinstated.

ANALYSIS

I. Standard of Review

“In ruling on a petition for writ of administrative mandamus, the trial court reviews the administrative record to determine whether the agency’s decision is supported by substantial evidence. [Citations.] The court must consider all relevant evidence in the record, but “[i]t is for the agency to weigh the preponderance of conflicting evidence [citation]. Courts may reverse an agency’s decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion

reached by the agency.” [Citations.] The standard of review for this court is identical: We, too, determine whether substantial evidence supports the administrative decision. [Citations.]” (*Eden Hospital Dist. v. Belshé* (1998) 65 Cal.App.4th 908, 915-916.)¹

II. There Was Substantial Evidence to Support the Director’s Decision

On June 12, 2002, the Director affirmed the Commissioner’s decision and found that there was substantial evidence to support the finding that Tudor violated CCR, title 3, section 6614, subdivision (b)(2). The trial court disagreed and found that there was no substantial evidence to support the Director’s decision. The trial court thereby granted Tudor’s writ petition. We now find that there *was* substantial evidence to support the Director’s decision.

A. There Was Substantial Evidence to Support the Director’s Decision That Tudor Violated CCR, Title 3, Section 6614, Subdivision (b)(2)

CCR, title 3, section 6614, subdivision (b)(2) provides: “Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued

¹ We reserved ruling on the Department’s motion to strike: 1) an exhibit attached to the respondent’s brief (the Pesticide Drift Incident Response Policy (the Policy)); and 2) certain portions of the respondent’s brief which rely on the Policy and raise new issues. “It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal. [Citations.]” (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.) The Policy was not before the trial court, and the issues raised in the respondent’s brief, which refer to the Policy, were not raised below. Thus, those issues have been waived on appeal. The motion to strike is therefore denied as moot.

when: [¶] . . . [¶] [t]here is a reasonable possibility of damage to nontarget crops, animals or other public or private property.”

Initially, we note that a violation of CCR, title 3, section 6614, subdivision (b)(2), does not require a showing of actual damage, but rather is concerned with whether there was “a *reasonable possibility* of damage to nontarget crops, animals or other public or private property.” (CCR, tit. 3, § 6614, subd. (b)(2), italics added.) The Director found that reasonable inferences from the record showed that Tudor’s Dormex application was made when there was a reasonable possibility of damage to nontarget crops and nontarget private property. Specifically, Tudor did not use the extreme care required by the Dormex label to avoid contact of Dormex spray or drift with foliage of the lemon trees or the lemon crop.

In analyzing whether the record supports the Director’s decision finding that Tudor violated CCR, title 3, section 6614, subdivision (b)(2), we will consider whether the lemon tree orchard and the lemons were a nontarget crop or private property, and whether Tudor applied Dormex when there was a reasonable possibility of damage.

1. Venus Ranches’ Lemon Tree Orchard Was Private Property

CCR, title 3, section 6614, subdivision (b)(2) restricts pesticide application when there “is a reasonable possibility of damage to nontarget crops, animals or other public or private property.” The Director found that Venus Ranches’s lemons were a nontarget crop and the lemon trees were private property. It is undisputed that on December 19, 2000, Tudor applied Dormex to its vineyard that was located directly north of the lemon tree orchard owned by Venus Ranches. It is also undisputed that the lemon tree orchard

was not the intended target of the Dormex application. Although Tudor argues that there was no damage done to the lemon crop itself, as opposed to the lemon tree leaves, the code section prohibits pesticide use when there is a reasonable possibility of damage not only to crops, but also to private property. The lemon trees and leaves constituted Venus Ranches's private property.

2. There Was a Reasonable Possibility of Damage to Venus Ranches's Private Property

The Director found that Tudor did not use the extreme care required by the Dormex label to avoid contact of the Dormex spray or drift with the foliage or the crops; thus, there was a reasonable possibility of damage occurring. The evidence supports this finding.

The Dormex label states: "When spraying close to susceptible crops, for example, *lemons*, crops in bloom, *sensitive foliage*, etc., *a buffer zone* is suggested to be used. Extreme care *must* be used to avoid contact of the spray or drift with foliage, green stems, or fruit or desirable crops since severe damage and crop loss may result." (Italics added.)

The Dormex Permit Conditions, which Marion Tudor signed and agreed to, explicitly stated that "[f]or application sites near lemons that have the potential for drift damage, it is strongly recommended that the applicator implement *whatever additional* application controls as necessary in order to prevent new problem areas." (Italics added.) The Permit Conditions also explicitly warned Tudor that "[d]efoliation of lemon leaves resulting directly or indirectly from an application of Dormex to the permittees[']

grapevines, *shall* constitute a violation/conflict of these permit conditions and *will* result in administrative/civil enforcement actions” (Italics added.)

The Director found, and the record shows, that Tudor did not use an untreated buffer zone between its vineyard and Venus Ranches’s orchard, even though it was applying Dormex close to susceptible crops and sensitive foliage.

Furthermore, the Director found that there was defoliation on the trees in Venus Ranches’s orchard following Tudor’s Dormex application. Tudor claims there was no evidence presented that any of the trees were defoliated. Tudor cites Food and Agricultural Code section 12752, which states that “‘defoliating’ includes killing or artificially accelerating the drying of plant tissues, with or without causing abscission.”

Contrary to Tudor’s claim, there was substantial evidence of defoliation. The plain definition of “defoliate” is “to strip (trees, etc.) of leaves.” (Webster’s New World Dict. (3d college ed. 1998) p. 362.) On December 25, 2000, Hudson noticed leaf drop, or defoliation, from the lemon trees along the north side of the lemon tree orchard. The record shows that, on December 28, 2000, Brown and Kregl went to the lemon tree orchard and observed leaf drop from lemon trees in the first four rows on the northern edge of the orchard. In Brown’s report, she noted that “[t]he leaves had dropped leaving behind the petiole,” which was “an indication of a Dormex exposure.” Brown stated that Tudor’s Dormex application caused the leaf drop at Venus Ranches’s lemon orchard.

Similarly, during the hearing on December 4, 2001, Brown testified that she felt that the leaf drop that she observed on December 28, 2000, was caused by Dormex exposure. She also testified that the leaf drop started in the north part of the orchard and

started downward toward the south part. Brown further testified that damage caused by Dormex exposure manifests itself within five to seven days after a Dormex application. Tudor applied Dormex on December 19, 2000, and Hudson noticed the leaf drop on December 25, 2000. Thus, the record supports a finding that the leaf drop in the lemon tree orchard was caused by Tudor's Dormex application.

The Director concluded that it was reasonable to infer from the record that Tudor did not use the extreme care required by the Dormex label to avoid contact of the Dormex spray or drift with sensitive foliage, and that Tudor's Dormex application was made when there was a reasonable possibility of damage to nontarget crops and private property. The record shows that Tudor did not use an untreated buffer zone and that there was defoliation on the lemon trees in Venus Ranches's orchard within six days after Tudor's Dormex application. Thus, the evidence supports the Director's findings.

B. There Was Substantial Evidence to Support the Director's Finding That Tudor's Violation of CCR, Title 3, Section 6614, Subdivision (b)(2) Was "Serious", Within the Meaning of CCR, Title 3, Section 6130

The Director found that it was reasonably inferable from the record that Tudor's violation was properly classified as "serious," within the meaning of CCR, title 3, section 6130. There was substantial evidence to support this finding.

CCR, title 3, section 6130 is used to determine the types of violations for which fines may be assessed and the amounts of the fines. We note that CCR, title 3, section 6130 has been amended since Tudor's writ petition was granted. At the time the writ petition was granted, the regulation read as follows:

“For the purposes of this section, violation types are designated as ‘serious’, ‘moderate’, and ‘minor’. [¶] . . . ‘Serious’ violations are repeat violations in subparagraph (2) [violations that pose a reasonable possibility of creating health or environmental effect] or violations which create an actual health or environmental hazard. The appropriate fine level range for these violations is \$400-1,000.”

Tudor’s violation of CCR, title 3, section 6614 created an environmental hazard or danger since Tudor’s Dormex application resulted in actual damage. The record shows that Tudor’s use of Dormex on December 19, 2000, caused leaf drop in the first four rows of lemon trees at Venus Ranches’s lemon orchard. In addition, there was evidence that lemon leaf loss results in an uneven crop and a lower quantity of fruit. At the hearing, Brown testified that when a tree loses its leaves, “there has to be some energy to push out new leaves.” Thus, the next season’s crop would be affected because of the energy used to produce leaves. In other words, a tree would have less energy available to produce fruit.

In addition, Hudson testified that leaf growth is relied upon to produce crops throughout the year. He stated that the effects of leaf loss from a lemon tree are “ugly, rough skin” in the lemon crop and fruit production from the tree “at the wrong time of the year.” Hudson stated that, “by the time you’re picking your crop, the fruit is no good.”

In light of the above, there was substantial evidence to support the Director’s finding that Tudor’s violation of CCR, title 3, section 6614 was “serious” within the meaning of CCR, title 3, section 6130.

II. The Decision in the Bagdasarian Action Is Irrelevant

In the respondent's brief, Tudor claims that the "second element of this appeal" is that, even though the same witnesses testified at the Bagdasarian hearing, and the same evidence was presented, there were two different conclusions by the same hearing officer. (The count against Bagdasarian was dismissed.) Tudor argues that the hearing officer should have arrived at the same conclusion in the action against Tudor and the action against Bagdasarian.

The appellant in this case, the Department, has not raised any issue concerning the Bagdasarian decision in its appeal. This appeal concerns Tudor; thus, the only determination before us is whether there was substantial evidence to support the Director's decision against Tudor. (*Eden Hospital Dist. v. Belshé, supra*, 65 Cal.App.4th at pp. 915-916.) Therefore, Tudor's responses relying on the Bagdasarian action are inappropriate and irrelevant. The Bagdasarian action and the Tudor action were two separate cases. While we acknowledge that the same hearing officer issued different decisions in the two actions, perhaps, as Tudor claims, the hearing officer should have reached the same conclusion in both actions. We note Brown's recommendation in her report that both Tudor and Bagdasarian should have been issued a violation. In any case, substantial evidence supports the Director's decision that Tudor violated CCR, title 3, section 6614, subdivision (b)(2).

DISPOSITION

We reverse the trial court's grant of Tudor Ranch, Inc.'s petition for writ of mandate. Costs on appeal are awarded to the Department of Pesticide Regulation of the State of California.

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s/Ward
Acting P.J.

We concur:

s/Gaut
J.

s/King
J.